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# Supreme Court of the United States

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OCTOBER TERM, 1945.

No. **339**  
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ROBERT A. FISCHER, THE FISCHER COR-  
PORATION and A. S. ALOE COMPANY.

*Petitioners,*

*vs.*

F. H. BOWERS and LOUIS J. BRISTOW,

*Respondents.*

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Petition for Writ of Certiorari to the United States  
Circuit Court of Appeals for the Ninth Circuit  
and Brief in Support Thereof.

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*Attorney for Petitioners.*

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Petition for Writ of Certiorari to the United States  
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*To the Honorable, the Chief Justice, and the Associate  
Justices of the Supreme Court of the United States:*

Your petitioners, Robert A. Fischer, The Fischer Corporation and A. S. Aloe Company, pray that a writ of certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Ninth Circuit, filed April 21, 1945, as amended by order of June 1, 1945, reversing the judgment of the United States District Court for the Southern District of California, Central Division, as to petitioners. A memorandum opinion of the District Court and the summary judgment rendered appear on pages 109 to 113 of the transcript of record furnished herewith. The

opinion of the Circuit Court of Appeals was withdrawn after petition for rehearing and the amended opinion and decree appear at pages 145 to 156 of the transcript of record.

### **Jurisdiction.**

The jurisdiction of this Court is invoked under §240(a) of the Judicial Code, 28 U. S. C. §347(a) as amended. There have been no concurrent findings by Courts below (*Altoona Publix Theatres, Inc., v. American Tri-Ergon Corp., et al.*, 294 U. S. 477).

### **Short Statement of the Case.**

An action for infringement of United States Letters Patent No. 2,123,709 was brought against the petitioners on October 26, 1942 in the United States District Court for the Southern District of California, Central Division. Petitioners filed a timely answer and two sets of requests for admissions under Rule 36, F. R. C. P. Plaintiffs below did not file answers to these requests. It is established by the authorities that facts requested are admitted unless denied.

Petitioners moved for summary judgment [Tr. 79-94] and after hearing, the trial Court was satisfied that there was no genuine issue as to any material fact and granted the motion for summary judgment.

The Circuit Court of Appeals reversed the judgment of the trial Court on the ground that findings of fact and conclusions of law are required by Rule 52(a) even though a summary judgment was granted under the provisions of Rule 56(b) and (c). The Circuit Court of Appeals further held that the trial Court erred in striking

answers to requests (filed late and without leave of Court), that the affidavits filed were in opposition, that there was an issue as to material facts, and hence a summary judgment was not proper.

### **Questions Presented.**

1. Does Rule 52(a) of Federal Rules of Civil Procedure require findings of fact and conclusions of law where the action is determined by the granting of a motion for summary judgment?

2. Does Rule 42(b) and (c) of Federal Rules of Civil Procedure require findings of fact and conclusions of law to be lodged when a motion for summary judgment is granted?

3. Does a trial Court abuse its discretion in striking affidavits and answers to a request for admissions

(a)—which do not conform to the requirements of Rule 56(e),

(b)—which are filed after the day of hearing on a motion for summary judgment and in violation of the requirements of Rule 56(c)?

### **Reasons for Granting the Writ.**

1. The Circuit Court of Appeals has decided a question of practice and procedure under the Federal Rules of Civil Procedure which question has not been, but should be, settled by this Court, or has decided such question in a way probably not in accord with this Court's intended construction of Rules of Civil Procedure.

The Supreme Court of the United States has the power to prescribe general rules for the practice and procedure in the District Courts of the United States (Act of June

19, 1934, c. 651 §1) and has done so. It is submitted that this Court should decide the applicability and scope of the rules since the decision of the Circuit Court of Appeals renders impotent Rules 56(b) and (c).

In the instant case the Circuit Court of Appeals holds that the filing of an answer raises issues, that the presentation of affidavits as contemplated by Rule 56(c) also raises issues as to material facts and appears to deprive the trial Court of authority to render a summary judgment.

A defendant in a patent case should not be forced into a protracted trial for alleged patent infringement and deprived of the right, given by the Federal Rules of Civil Procedure, of obtaining a summary judgment in his favor, when, as here, the admissions and exhibits before the trial Court permit the trial Court to dispose of the matter on questions of law alone.

2. The decision of the Circuit Court of Appeals is of great public importance inasmuch as it places obstacles in the way of all defendants entitled to a summary judgment. Litigation in other circuits on the patent in suit herein is improbable. The issue is much wider in scope than the patent in suit and affects the application and enforcement of the Federal Rules of Civil Procedure in all cases brought in the Federal Courts.

3. The Circuit Court of Appeals has departed from the accepted and usual course of judicial procedure and interpretation of Rules 42(b) and (c), 52(a) and 56(c) and (e), and such departure calls for the exercise of this Court's power of supervision.

Since the Federal Rules of Civil Procedure have been prescribed by this Court, it is submitted that this Court should exercise supervision of the administration and interpretation of such rules.

4. The Circuit Court of Appeals has decided an important question of administrative law in a way which is probably untenable and in conflict with the weight of authority.

All of the Federal Courts are interested in accurately interpreting and administering the Federal Rules of Civil Procedure. There is conflict as to the applicability of Rule 52(a) to summary judgments granted under Rule 56(b). Rule 56(b) is an important rule designed to attain the “\* \* \* just, speedy and inexpensive determination of every action” contemplated by Rule 1. By emasculating these rules, procedure becomes complex and not simplified.

5. The decision of the Circuit Court of Appeals is in conflict with decisions of the Circuit Courts of Appeals in other circuits and with the decisions rendered by the United States Court of Appeals for the District of Columbia relating to the interpretation and administration of the same rules.

The decision is in direct conflict with *Thomas, et al., v. Peyser, et al., United States Court of Appeals, District of Columbia*, 118 F. (2d) 369, where it was specifically held that:

“There is no merit in appellants’ contention that the trial Court should have made findings of fact.”



The decision is in conflict with other cases cited in the appended brief under the heading "Specification of Errors."

6. The Circuit Court of Appeals departed from precedent and weight of authority in stating that the trial Court abused its discretion in striking from the record answers which were filed without leave of Court and in violation of the specific provisions of Rule 56(c).

The weight of authority states that a judgment should stand if the opinion gives the appellate Court a clear understanding of the basis of the decision. The authorities uniformly hold that unless the decision of the trial Court was clearly erroneous, its judgment should not be disturbed. No such error appears in the record.

### **Prayer.**

Petitioners pray that a writ of certiorari issue to review the judgment and decree of the United States Circuit Court of Appeals for the Ninth Circuit, that said judgment be reversed, and that this Court decide the questions of practice and applicability of the Federal Rules of Civil Procedure presented by this petition.

Respectfully submitted,

CASIMIR A. MIKETTA,

*Attorney for Petitioners.*

State of California, County of Los Angeles—ss.

Casimir A. Miketta, being first duly sworn, deposes and says, that he is the attorney for the petitioners named in the foregoing Petition for Writ of Certiorari; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters, that he believes them to be true.

CASIMIR A. MIKETTA.

Subscribed and sworn to before me this 8th day of August, 1945.

MYRTLE JOHNSON.

*Notary Public in and for the County of Los Angeles,  
State of California.*

My commission expires April 17, 1949.